Integrated Dual-use Commercial Companies (IDCC) regarding government commercial item procurement practices.

Thank you for the opportunity to offer comments regarding government commercial item procurement practices as they currently apply to Integrated Dual Use Commercial Companies (IDCC). On behalf of the Integrated Dual-Use Commercial Companies (IDCC), I am pleased to provide our comments regarding three issues, 1; the need for commercial item definition clarification 2; the use of commercial item determinations and practices by the defense industry and 3; the application of FY2004 section 1443. IDCC was heavily involved in the acquisition reform activities that led to the formulation of the definition in the current rule and is grateful to be asked to participate again.

The IDCC was formed in 1991 as a consortium of predominantly commercial firms who seek to simplify and improve methods for doing business with the Federal government. Member firms include Corning, Inc., Dow Chemical Company, Eaton Corp., Eastman Chemical Company, Energizer Battery Manufacturing, Inc., Honeywell International, Inc., and W. L. Gore & Associates. These firms are technology leaders in their industries. All sell some commercial items to the Government under the FAR Part 12 provisions but most often function as subcontractors or suppliers to the defense industry.

Commercial Item Definition Clarification

IDCC has commented on previous efforts to clarify the definition of commercial items FAR 2.101. Our position has not changed. The definition of commercial item needs no further clarification including commercial item modifications. The Federal Acquisition Streamlining and Federal Acquisition Reform Acts and implementing regulations, were carefully drafted after years of debate between industry and Congress. The definition has served the public well over the last 10 years since its implementation in the FAR in 1995. We are concerned that clarifications that lead to definition changes would undo much of the progress made by these acts.

The definition was specifically crafted to provide Contracting Officers maximum discretion in making commercial item determinations. The regulations provide preplanning and market research tools under FAR parts 10 and 11 to assist and justify

their determinations. DOD's Commercial Item Guidebook goes into great detail explaining the regulatory requirements for making such determinations. Recent attempts to narrowly define and quantify what constitutes a commercial item are contrary to the goal of maximizing the Contracting Officers discretionary authority.

Commercial Item Practices at the Subcontract Level

Commercial item purchases at the subcontract level are an area where commercial item determinations and practices are not uniformly employed. We are disappointed that unlike our direct government customers, many prime contractors are not familiar with the preplanning and market research tools used by our government customers. Buyers are not familiar with these tools or the benefits they can provide in risk management and life cycle costs. Some prime contractors are avoiding their determination responsibilities by requiring the subcontractor's representation and certification of commerciality. Many primes have created new unique certification forms that place the burden of establishing a commercial item's status on their subcontractors. It is the experience of the IDCC companies that few prime contractors have invested in the research tools necessary to establish an item as a "commercial" or in training their supply chain professionals

The prime contractors with whom we are familiar often fail to distinguish the difference between a determination that an item is "of-a-type available in the commercial marketplace" and that the item's price is reasonable. One does not determine the other. Yet we see in these pointless forms that commercial item status is dependent upon its price rather than its availability in the commercial marketplace. The law is clear; an item's commercial status is dependent on the fact that the item has been sold, leased, licensed or offered for sale to the general public or, if not available in the commercial marketplace, that it will be available in time to meet the government's needs.

There is no statutory requirement to claim an exemption from TINA or CAS if a commercial item status determination has been made. Commercial items, by their definition, are exempt from both TINA and CAS requirements. Nevertheless, requests for certification of commercial status and requests for exemptions from TINA and CAS

applications and justifications are frequently being requested at all subcontract levels at or above the TINA and CAS thresholds as well as below the thresholds. In summary, many defense industry primes are not using commercial item procurement practices. Substantial benefits will accrue to all parties when government contractors use the same preplanning and market research tools as our direct government customers do.

It is possible that an item, item modification or advancement in technology may only have been offered or sold to the government but is still "of-a-type available in the commercial marketplace." The law was specifically drafted so the government could take advantage of a wide range of new commercial items that were not yet introduced in the commercial marketplace but would be in time to meet the government's needs. The failure of defense contractors to make proper commercial item determinations is preventing the ultimate government customer from receiving the benefits of newly developed commercial technologies.

Once the commercial item status determination has been made, then establishing price reasonableness should begin. Price reasonableness can be established using sales information from government resources, a contractor's own resources, and commercial market resources. Following the hierarchy of FAR 15.402, contractors should only be asked to supply information after all other means of establishing price reasonableness have been exhausted. From our experience, the burden of establishing price reasonableness starts with the subcontractor without any information gathering done by the prime contractor.

Application of NDAA FY2004 Section 1443

The Special Emergency Procurement Authority of Section 1443 of the National Defense Authorization Act raises several questions regarding its intent and implication. It appears to be drafted to authorize the use of streamlined commercial item procurement practices for non-commercial items. If this authority is used this way, the result is an implicit non-commercial determination - made by the government buyer without contractor engagement. We are uncomfortable with the use of this authority in an ipso facto

manner. Who better to defend and support its commercial item status determination than the contractor? When a commercial company sells this same item or service under different circumstances to a different buyer it could be confronted with a previous non-commercial item determination in government records. We also question whether the intent was to simply provide a legal mechanism to circumvent market research requirements when making a commercial item determination in the interest of time. If this is true can we be assured that the ability to sell these products or services in the future as commercial item will not be adversely affected by the application of this authority? Additionally, if an item is determined to be "non-commercial" under this process, how is "price reasonableness" to be determined? Are cost and pricing data going to be required, thereby voiding the benefits of commercial item designation?

In summary, we believe the definition of commercial item does not require clarification, commercial item determinations are not being made at the prime contract level but instead the responsibility is placed on the supplier and the application of NDSS Section 1443 benefits are unclear and may discourage commercial companies' participation if non-commercial item determinations are made when ever it is expedient..

We want to again thank you for this opportunity to participate in the process and welcome future dialog to discuss these issues directly.